custom of the service which could not appropriately be applicable to persons of all religious groups, but only to Muslims.

While their Lordships, for the reasons indicated above, have reached the same conclusion as the Federal Court, they consider that the Federal Court might well have expressed themselves more strongly than they did, near the end of their judgment, when they said "it is hoped" that the oath will be administered in future by the judge advocate personally. In their Lordships' view it is essential that, if any practice has developed whereby the oath is administered, either to members of courts-martial or to witnesses appearing before courts-martial, by persons other than the prescribed person, the practice should either be regularised by amending the Rules of Procedure or should be discontinued at once.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be dismissed. There will be no order as to the costs of the appeal to this Board.

Appeal dismissed.

Solicitors: *Bartletts, de Reya; Stephenson Harwood.*

KIM GUAN & CO. SDN. BHD. v. YONG NYEE FAN & SONS SDN. BHD.

[P.C. (Lord Fraser of Tulleybelton, Lord Scarman, Lord Brandon of Oakbrook, Lord Brightman and Sir John Megaw) February 1 & March 21, 1983]

[Privy Council Appeal No. 32 of 1980]

Practice and procedure – Appeal – Question of fact – Whether appeal court entitled to reverse decision of trial judge on question of fact – Oral testimony inconsistent with circumstantial documentary evidence – Oral testimony accepted by trial judge – Whether finding of trial judge could be reversed.

In this case the question of fact was whether the purchaser of shop premises or his family company (the respondent) in whose name the purchase was taken became the beneficial owner thereof in accordance with the ostensible title; or whether the purchaser constituted himself or his family company a trustee for the benefit of himself and his two business associates and the trading company (the appellant) which was formed to take over his business activities. The purchaser died five years after the purchase was made. Thirteen years later the younger of the two surviving business associates, who or whose family had come to own the trading company, claimed that a trust had been created at the time of the purchase. They gave evidence to the trial judge of an orally constituted trust. The evidence was totally inconsistent with the documentary evidence of a circumstantial nature extending over much of the intervening period. There was no suggestion that the documentary evidence was in any way fabricated or falsified. The trial judge accepted the oral testimony of the two surviving business associates despite its inconsistency with the circumstantial evidence. The Federal Court, although conscious of the difficulty and unwisdom of reversing a trial judge on a matter of fact deposed to by witnesses whom the trial judge had seen and heard nevertheless considered that such a course was in the circumstances proper to be taken – See [1979] 1 M.L.J. 182.

The appellant appealed.

Held: on the facts of the case and in the light of the documentary evidence it is impossible to support the conclusion reached by the trial judge. The Federal Court, which lost no advantage because it did not see and hear the witnesses, was fully justified in reversing and indeed was bound to reverse the trial judge.

Case referred to:

(1) *Watt or Thomas* v. *Thomas* [1947] A.C. 484, 487.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Dennis Levy Q.C. (*Thomas Jock Craven* with him) for the appellant.

Robert Walker Q.C. (*Jonathan Harvie* with him) for the respondent.

Cur. Adv. Vult.

Lord Brightman (delivering the Judgment of the Board): The issue on this appeal is whether the Federal Court of Malaysia was entitled to reverse the decision of the trial judge on a question of fact, thereby rejecting the evidence of two witnesses who were accepted by the trial judge as witnesses of truth. The question of fact was whether the purchaser of shop premises in 1954 (to be more precise, his family company in whose name the purchase was taken) became the beneficial owner thereof in accordance with the ostensible title; or whether the purchaser constituted himself or his family company a trustee for the benefit of himself and his two business associates and the trading company which was found to take over their business activities. The purchaser died five years after the purchase was made. 13 years later the younger of the two surviving business associates, who or whose family had come to own the trading company, with the assistance of the evidence of his former partner, claimed that a trust had been

created at the time of the purchase. They gave evidence to the trial judge of an orally constituted trust. Such evidence was admittedly totally inconsistent with the documentary evidence of a circumstantial nature extending over much of the intervening period. There is no suggestion that the documentary evidence was in any way fabricated or falsified. The trial judge accepted the oral testimony of the two surviving business associates, despite its inconsistency with the circumstantial documentary evidence. The Federal Court, well conscious of the *prima facie* difficulty and unwisdom of reversing a trial judge on a matter of fact deposed to by witnesses whom the trial judge had seen and heard nevertheless considered that such a course was in the circumstances proper to be taken. The trading company now appeals to this Board in an attempt to restore the order of the trial judge.

The convenient course will be to refer first to the documentary evidence and other undisputed facts, before turning to the oral evidence of the two surviving business associates by whose testimony the trial judge was persuaded.

The three business associates were Yap Fook Sen ("Yap"), Tan Phang Nam ("Tan") and Yong Nyee Fan ("Yong"), all of whom lived at Ipoh. They were Chinese businessman. Yap and Tan carried on business as cloth merchants at 65 Hugh Low Street, Ipoh, under the name of Kim Guan & Co. Yong and his family had interests in property through a family property company known as Yong Nyee Fan & Sons Ltd., now called Yong Nyee Fan Sendirian Berhad. This company is the respondent to the appeal, and will be referred to as the "Property Company".

In 1954 discussions took place between Yap, Tan and Yong as to the possibility of carrying on business at shop premises at 26 Hugh Low Street, Ipoh which were then owned by Chin Thin Voon. The title was registered. The premises were in the occupation of Thong Sang Woh, who paid the registered proprietor a monthly rent of $220.

On October 28, 1954 the property was transferred by the registered proprietor to the Property Company in consideration of a purchase price of $35,000 paid by the Property Company.

On November 30, 1954 the tenant Thong Sang Woh wrote a formal letter to the Property Company expressing his desire to surrender the premises to the Property Company to enable them to be let to the Kim Guan Company. This followed an agreement made by Yap and Tan with the tenant under which he would vacate the premises on payment of $19,000. This sum was paid by Yap and Tan.

Yap and Tan, carrying on business as the Kim Guan Company, went into occupation of the premises at the beginning of January. On February 12, 1955, a company was incorporated with the name Kim Guan & Co. Ltd., now called Kim Guan & Company Sendirian Berhad. This will be called the "New Company". It had a capital of $500,000 divided into 50,000 shares of $100 each. The subscribers to the Memorandum of Association were Yong, Tan and Yap, who were also named as the first directors of the company.

On February 15, 1955 the Property Company gave the New Company a receipt for $660 expressed to be rent for No. 26 for the months of December 1954 and January and February 1955.

On February 25, the first board meeting of the New Company was held. There were present Yong, Tan and Yap, and a representative of and also an interpreter for Messrs. Payne, Davis & Co., who were appointed at that meeting to be the auditors of the company. 1,208 shares were allotted for cash, and 1,782 shares were credited as fully paid up in anticipation of a proposed sale agreement whereby the business of Yap and Tan was to be transferred to the New Company. The sale agreement was before the meeting, but execution was deferred pending receipt of the certificate of incorporation of the New Company. Tan became the chairman of the board, Yap the managing director.

On March 12, 1955 the Property Company gave the New Company a receipt for $220, expressed to be rent for No. 26 for the month of March.

On March 24, 1955 the sale agreement was executed. It was made between Tan and Yap of the one part and the New Company of the other part. Tan and Yap assigned their partnership business to the New Company as from January 1, 1955 in consideration of 1,782 shares.

Monthly receipts continued to be issued by the Property Company to the New Company for $220 expressed to be rent for No. 26.

On July 20, 1956 the Property Company wrote

a letter to the New Company which was expressed to give one month's notice to terminate the tenancy, but offering a new tenancy as from September 1, 1956 at $300 a month. This increased payment was made as from that date, and so continued in each month down to April 4, 1973.

In 1957 three board meetings of the New Company were held, the minutes of which are significant. The first meeting was on February 5. Tan and Yap were present, and two other directors, but not Yong, who had threatened to resign from the board owing to some dispute. The minutes of that meeting contain the following entry:

"Purchase of 26, Hugh Low Street, Ipoh, for $45,000/-

Messrs. Yong Nyee Fan & Sons Limited, the owner of this premises decided to sell this premises for the sum of $45,000/-. The directors realized that it will be advantageous to the Company if the Company buys over his shop. After much discussion it was unanimously agreed to buy 26, Hugh Low Street, Ipoh for the sum of $45,000/-.

Grant of 26, Hugh Low Street, Ipoh

The directors gave power to the Managing Director to hand over the grant of the above premises to the Chung Khiaw Bank Limited, Ipoh as surety for the loan of $30,000/-. Should the sum of $30,000/- be insufficient to make up for the purchase price of this premises. Mr. Tan Phang Nam and Mr. Yap Fook Seng would be empowered to get a further loan of $15,000/- from the Chung Khiaw Bank Limited, Ipoh."

A further board meeting was held on March 11, 1957, Tan and Yap being present and Yong again absent. The minutes contain this entry:

"Minutes: Minutes of the last Directors' Meeting held on February 5, 1957 were read and adopted with slight amendment.

Matters arising out of the minutes:

(a) Purchase of 26, Hugh Low Street, Ipoh

The Directors decided to have the transfer of this property put through when Messrs. Yong Nyee Fan & Sons Limited decided to do so."

The last of the three meetings was on July 28, 1957. The minutes record this:

"Minutes: Minutes of the last Directors' Meeting held on March 11, 1957 were read and adopted with slight amendment.

Matters arising out of the minutes:

(a) Purchase of 26, Hugh Low Street, Ipoh

This item has not been carried out as the owner of this property has not decided to sell it yet. Meantime this item is to be left in abeyance for the time being."

The minutes of these three meetings were in each case signed by Tan as "Confirmed", pursuant to a resolution approving them which was passed at the next ensuing meeting.

On March 22, 1958 the auditors Messrs. Payne, Davis & Co. certified the balance sheet of the New Company as at December 31, 1957, and the trading account for that year. The certificate is in the usual form, stating that:

"We have examined the above balance sheet with the books and papers and have obtained all the information and explanations we have required."

The balance sheet does not disclose No. 26 as an asset of the New Company. The trading account, on the other hand, contains a debit entry "Shop rents – No. 26, Hugh Low Street, $3,600", which is the equivalent of $300 a month. The balance sheets and trading accounts of the New Company for other years are not in evidence.

On July 15, 1960 Yong died. In the following year a dispute arose between Yong's son. Yong Su Hian, and the New Company arising out of the directors' refusal to sanction a transfer of shares in that company. In the course of the dispute, on September 12, 1961, the Property Company sent to the New Company a notice expressed to terminate the New Company's tenancy of No. 26. However the dispute was settled and on October 24, 1961 Messrs. Maxwell Kenion Cowdy and Jones, the solicitors for the Property Company, wrote to the New Company in the following terms:

"Our clients have instructed us to withdraw the notice sent to you on September 12, 1961, terminating the tenancy of the above premises."

By 1964 the Yong family had sold all their shares in the New Company. Tan had retired from the board in 1962, and also parted with his shares. Ultimately all the shares in the New Company came into the ownership of Yap and his family.

On 23rd January 1967 Messrs. Maxwell Kenion Cowdy & Jones addressed the following letter to the New Company:

"Re: – Premises No. 26, Hugh Low Street, Ipoh

1. We act for Yong Nyee Fan & Sons Ltd. of No. 1,

Brewster Road, Ipoh, which is the landlord of the above-captioned premises of which you are the tenancy occupying the whole premises paying a sum of $300/- as monthly rent in addition to which you also pay assessments.

2. As you are aware the said premises are covered by the new Control of Rent Act 1966. Our client has instructed us to write to you and commence negotiations with you, to determine the fair rent of the whole of the said premises under the provision of section 7(1) of the said Act.

3. Our client has assessed the fair rent of the said premises at the sum of $700/- per month excluding the continued payment of assessment by you. We shall be pleased if you would kindly let us know, on or before February 14, 1967 whether you agree with our client's assessment of the fair rent. If you fail to communicate with us as requested, our client will presume that you dispute the said assessment of the fair rent by our client and our client will thereafter commence proceedings under Section 7(3) of the said Act."

This was followed by another letter dated February 3 as follows:

"Enclosed is a receipt for February rental.

By now you must have received our Solicitors letter dated January 23, 1967 to which we have not your reply. However please note that unless a fair rental is reached within this month, we shall not be in a position to receive any further payment of rental from you.

We are sure you realise the present rental is far too out of place with the investment value of the premises. In order that we may get a reasonable investment return for our premises, we may be forced to rebuild the premises, which means that you will have to be ejected from the premises.

Perhaps you would care to come to see us to discuss about the fair rental for the premises."

There does not appear to have been any letter from the New Company or their solicitors in reply to these two letters. In the event the monthly payments were not increased.

It is necessary to refer to three further letters before concluding this narrative of the undisputed facts. On June 4, 1960 the New Company wrote a letter to the Property Company in the following terms (as translated from the Chinese by the court interpreter):

"I enclose herewith a Chung Khiaw Bank cheque for $300/-, please check and receive, being payment for rent for the month of June. Kindly send me a receipt."

On August 2, 1960 the New Company wrote to the Property Company in the English language, as follows:

"We enclose herewith a cheque for $577.20 being payment for the following:—

(i) Rent for August 1960, 26, Hugh Low Street, Ipoh $400.00

(ii) Assessment for 2nd half year, 26, Hugh Low Street, Ipoh $277.20

Total . . . . . $577.20"

$400 was a typing error for $300 as is apparent from the total. On December 3, 1960 the New Company wrote to the Property Company in English as follows:—

"**Re: Rent for 26, Hugh Low Street, Ipoh**

We are sending you a cheque for $300/- being payment for rent re the above premises for the month of December, 1960."

No other covering letters in respect of the monthly payments are in evidence. Their Lordships will have occasion later to refer to these three letters and will call them "the 1960 letters".

On May 29, 1970 Chin Fook Yen, acting as the solicitor for the Property Company, wrote a letter to the New Company which was expressed to give one year's notice to quit, and in January 1973 the Property Company began proceedings to recover possession. On April 10, 1973 the Solicitors acting for the New Company wrote to the Property Company claiming for the first time that in 1954 it had been agreed between Yong, Yap and Tan that No. 26 should be bought on behalf of the New Company. According to this claim it had been agreed that the purchase price for the acquisition of the property was to be advanced by Yong, while Yap and Tan were to advance the money ($19,000) to be paid to the then tenant to persuade him to give up possession; that the premises, when so acquired, were to be held in trust for the New Company; that the premises were to be transferred to the New Company upon such company reimbursing the Property Company for the purchase price of $35,000 plus $2,000 agreed expenses; and that the amount of such reimbursement was later agreed at $45,000. In the result it was claimed that a 19/56 share in the property was held in trust for the New Company representing the $19,000 paid by Yap and Tan for vacant possession, and that a 37/56 share was similarly held subject to reimbursement of the agreed sum of $45,000.

Shortly thereafter the New Company began proceedings and sought relief against the Property Company as outlined in its solicitors' letter.

At the trial the evidence to support the beneficial interest of the New Company consisted exclusively of the oral testimony of Yap and Tan. The evidence of Yap was as follows. He said that there was an agreement between the three parties that the purchase of the shop premises should be made on behalf of the New Company. He and Tan did not know that the property had been bought in the name of the Property Company until the rent demand was presented in February 1955. They objected to this because the property belonged to the New Company and not to the Property Company. At first they threatened to withdraw from the business, but ultimately Yong agreed to transfer the premises to the New Company at $37,000, made up of the purchase price of $35,000 and $2,000 expenses: to accept $220 interest in the meantime "which worked out at 6%"; and "temporarily the $220 interest was to be treated as rent. It was only a temporary measure". The increase of the monthly payment from $220 to $300 was said to be in line with an increase in bank rate. As regards the board meeting of February 5, 1957 –

"The board agreed to have the house transferred at $45,000 instead of $37,000 because it was a benefit to the company ... After this meeting I chased after Yong for the title deed for the purpose of the transfer to the company. He told me not to worry as it was all written in the minutes of the meeting."

Again in 1961 Yap requested Yong' son, Yong Su Hian, to transfer the property at $45,000 as stated in the minutes of the meeting, but –

"I did not file any suit because we Chinese if avoidable would not come to court ... It is not beneficial to a company to litigate ... In 1973 the defendant company took proceedings against my company for development. Because of that I have filed this suit."

In re-examination he confirmed that "the $220 rent stated as rent actually was interest".

Tan's evidence was to a similar effect.

"There was a meeting between the 3 of us. We decided he [Yong] was responsible for the purchase of the house for the company ... When I found the house registered in the name of [the Property Company] I asked Yong why have it in his company's name. He said 'never mind; later it will be transferred to the company'. If he did not agree I would have left the company. This was settled by the well wishes of both sides. The settlement was that as he had purchased it he should be compensated by way of interest to take form of rent."

The principal witnesses for the Property Company were Yong's daughter, Yong Toong Liew and his son, Yong Su Hian. His daughter was aged 26 in 1954. She was a director of the Property Company. She gave evidence of a discussion with her father and another director as a result of which the Property Company decided to buy the property and to let it to the New Company. She was appointed secretary of the New Company in March 1955, and remained in that office until 1959. She believed she had drafted the minutes of the board meeting of February 5, 1957. This was the meeting at which "It was unanimously agreed to buy No. 26 ... for $45,000". She said that "during all the period when I was secretary of Kim Guan I never heard property No. 26 although registered in Yong & Sons, was held in trust for Kim Guan". She added in cross-examination "We bought the premises for our company Yong & Sons for investment".

Yong Su Hian became a director of the Property Company in 1955, at which time he would have been aged 21 or thereabouts. He became a director of the New Company two years later and so remained until 1959. He said that he never heard that No. 26 "was trust property for Kim Guan & Co. Ltd. I have been receiving rentals from the plaintiff company. Whenever they send rentals to the company I received no complaints it was not rental but interest".

There was also evidence from Ho Khoon Hee, who was a director of the New Company for part of 1960/61. He said that he did not know that No. 26 belonged to the New Company or was held in trust by the Property Company.

In approaching the record of the evidence it should be appreciated that the evidence of Yap and Tan was given through an interpreter. Furthermore, there was no shorthand note of the evidence, which is therefore not recorded in the form of question and answer.

The learned trial judge first directed himself to the important parts of the documentary evidence, in particular the contents of the relevant minutes, the receipts of monthly payments expressed as rent, and the three notices to quit. He then considered how to deal with the discrepancies between the documentary evidence and the oral evidence. He said this:

"One thing is clear so far and that is this – what is contained in some of the documentary evidence is not quite the same as what is said by the witnesses. Because their versions are diametrically opposed there is then the ques-

tion of how to get a clear picture of what actually happened. On going through the oral evidence and the documentary evidence in this case there is therefore in my view a need ... to reconcile their oral evidence with the documentary evidence."

He added:

"One will not get a clear and true picture of what actually happened unless a finding is made first on the credibility of each of the witnesses concerned."

In the course of his consideration of the credibility of the witnesses, the learned judge indicated his approach to the documentary evidence. The minutes of the board meetings of the New Company had to be viewed bearing in mind that the secretary was Yong's daughter, and she drew up the minutes and then showed the draft to her father before finalising them. Furthermore, she did not interpret the minutes after reading them to the next meeting, although she could have done; they were interpreted by Yau Yit Ping (appointed a director in March 1956) who was not called to give evidence though available. In addition, it was clear from the evidence of Yap and Tan that they –

"had all along followed the traditional Chinese way of doing business, i.e. dealings based on mutual trust. On going through their testimonies I do not think I would be fair to reject outright all that they said in the witness box."

As regards Yong Su Hian, the learned judge did not accept him as a witness of truth. "To my mind he represents the new type of business man who believes only in what is written down. The amount paid must be rental and not interest because the receipts say they are rentals." There were discrepancies in his evidence. "In many instances, therefore, in my assessment Yong Su Hian would appear to be not truly a witness of truth."

The learned judge expressed his conclusions as follows:

"In this case it seems obvious on going through the evidence of the various witnesses that it is really a matter of credibility.

Apart from Yap, Tan has also given evidence of the alleged trust and the fact that Tan has no more interest in the plaintiff company from as far back as 1962 when he and members of his family withdrew from Kim Guan and that he appeared to me to be a witness of truth provides a lot of weight to the plaintiff's version of what actually took place between the three persons involved. The plaintiff's version of what actually took place seems to be the more probable. It can also be said that every one of the defence witnesses has something or some interest to protect. As regards Yong Toong Liew even her shares in Kim Guan were paid for by her father. In Yong Nyee Fan Company, Yong Nyee Fan was in fact in the words of Yong Su Hian the moving spirit although he denied he continued to be so after he ceased to be director. Thus the circumstances under which the defendant company acquired the property in question were such that the defendant company must have acquired the said property as a constructive trustee. After all a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience. It arises in a situation similar to the situation of this case where a person acquired the property in such circumstances that the holder of the legal title thereof may not in good conscience retain the beneficial interest."

The appeal came before the Federal Court in 1978. The principal reasons for reversing the trial judge can be summarised as follows:

(1) The discounting of the probative value of the minutes because they were drafted by Yong's daughter, and because the director of the New Company who interpreted them was not called by the defendants to give evidence, was misconceived. It was no part of the plaintiff's case that the minutes were an incorrect record of what occurred at board meetings, nor that they were incorrectly interpreted when read out at the subsequent meeting.

(2) The attempt to explain away the rental payments as interest payments at 6% on the purchase price of $35,000 (or $37,000) was not arithmetically viable, because interest so calculated would be $175 (or $185) a month. The explanation put forward was even more vulnerable when the monthly payment was raised to $300, said by Yap and Tan to be 8% (following a rise in bank rate) on the newly agreed figure of $45,000, because the increase was demanded in July 1956 and paid as from September 1, 1956, while the figure of $45,000 was not agreed until February 1957.

(3) The rejection of Yong Su Hian as a witness of truth was no reason for deciding in favour of the plaintiff. The claim of the New Company as to what occurred in 1954 must stand or fall by the evidence of Yap and Tan, and by such evidence by way of admissions or otherwise as it could get from the other side; it could not succeed merely on the defects of Yong Su Hian as a witness, or on any deficiencies of the other defence witnesses.

The court added – "Reading the judgment of the learned judge as a whole, we see that he really could not and did not find any evidence pointing to Yong Nyee Fan constituting himself the trustee

of House No. 26 for Kim Guan & Co." The appeal was allowed accordingly.

It was accepted before their Lordships that this appeal cannot succeed unless it can be shown that the trial judge properly reached the conclusion that the outcome of the discussions in 1954 between Yong, Yap and Tan was that the New Company was to be the beneficial owner of the shop premises.

The appellant accepts that the documentary evidence is totally inconsistent with such a conclusion. It is appropriate to refer to the speech of Lord Thankerton in *Watt or Thomas* v. *Thomas*[1]

"Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion."

As already indicated the appellant accepts that the board minutes were accurate, so far as they went, suffered no falsification at the hands of Yong's daughter or anyone else, and were not misrepresented when translated at the succeeding board meeting. Against that background, can it be said that the trial judge enjoyed an advantage by reason of having seen and heard the witnesses which is sufficient to explain or justify a conclusion by the trial judge which contradicts the documents? The answer to that question must be, No. As the Federal Court pointed out any deficiencies of the Property Company's witnesses did not help the New Company, since the New Company's claim depended on the strength of the testimony of Yap and Tan, and not on the weakness of the testimony of others. What advantage, therefore, did the judge gain from seeing and hearing Yap and Tan in the witness box, which was denied to the Federal Court and entitled the trial judge to brush aside the clear message of the documentary evidence? Their Lordships see none. It was essential to the New Company's case that Yap and Tan should explain away the documentary evidence. This they signally failed to do. To assert (as their Lordships will accept) that it was traditional among the Chinese business community to carry on business deals on the basis of mutual trust without troubling overmuch about the printed word, while capable of explaining the absence of a written document or small deviations from it, does nothing to explain away the presence of a written document whose terms fundamentally contradict the oral evidence which a party wishes the court to believe.

When the documentary evidence is examined in detail, the attempt of Yap and Tan to establish by their oral evidence the conclusion of the alleged bargain inevitably fails:–

(1) The mode of calculation of the supposed interest is not rationally explained.

(2) No credible explanation is proffered for the absence of any document reflecting any protest against rent demands as such, and against notice to quit as such, served over the 18 years that elapsed between the purchase of the property by the Property Company and the allegation by the New Company of the existence of a trust.

(3) There is no explanation why at the board meetings of February 5, March 11, and July 28, 1957, the directors of the New Company were talking in terms of the Property Company deciding to sell No. 26, of the New Company deciding to buy because "it will be advantageous", and of the "owner" of this property "not deciding to sell it yet".

(4) There is no explanation why in 1958 the accounts of the New Company were prepared and audited on the basis that No. 26 should not be included as an asset of the company, that the $45,000 (as it then was according to the New Company's story) should not be included as a liability of the New Company, and that the monthly payments should be described as "rents" in the trading account of the New Company. The auditors had been in office since the birth of the New Company. Unlike the rent receipts, the accounts were the New Company's own documents. The New Company could and would word them as it thought proper. Even if the New Company acquiesced in monthly receipts which misrepresented the true position, it had no reason whatever to propagate the same misstatement in its own accounting documents.

(5) The 1960 letters are also significant because they again would be worded as the New Company though fit. No explanation was given why the New Company elected to describe the payments which it was making as "rent", when it had the opportunity to describe them as payments of interest.

In their Lordships' view it is impossible to support the conclusion reached by the learned

trial judge. The Federal Court, which lost no advantage because it did not see and hear the witnesses, was fully justified in reversing and indeed was bound to reverse the trial judge.

For the reasons indicated, their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed. The appellant must pay the respondent's costs.

Appeal dismissed.

Solicitors: *Graham Page & Co.; Gasters.*

SINGAPORE REPORTS

KARL LJUNGBERG & CO. AB v. THE NETHERLANDS INSURANCE CO. EST. 1845 LTD.

[C.A. (Kulasekaram, Chua & Rajah JJ.) March 24, 1983]

[Singapore – Civil Appeal No. 23 of 1982]

Insurance – Marine insurance – Insured were consignees of goods lost or damaged – Denial of liability by insurers – Insured sued third party/owners of vessel in Japan – Whether insurers should indemnify insured for all legal costs incurred in actions in Japan.

Shipping Law – Marine insurance – Indemnity – Whether insurers should indemnify insured for legal costs incurred in actions against third party in Japan.

The appellants were consignees of goods shipped on M.V. "Mammoth Pine" and which were insured under a marine insurance policy with the respondent insurers. On March 20, 1980, the said goods were found to be missing and/or damaged. The appellants claimed against the respondents under the said insurance policy. However, the respondents at first denied liability *in toto*. The appellants then commenced action against the respondent in Suit No. 850 of 1981 claiming damages in the sum of $64,140.68. In March 1981 the appellants commenced actions in Japan against the owners of the vessel and the charterers. The action (Suit No. 850 of 1981) against the respondents was discontinued in June 1982. The respondents, however, did not agree that they should indemnify the appellants for all the legal costs and disbursements as regards the said two actions in Japan, notwithstanding that the appellants' solicitors had suggested that the respondents might do so without prejudice to their denial of liability. The appellants contended that it was at the insistence of the respondents that they commenced the actions in Japan and that it was only right that the respondents should indemnify them for the costs.

The said insurance policy was subject to the Institute Cargo Clauses (All risks). Clause 9 thereof read:

"It is the duty of the Assured and their Agents, in all cases, to take out measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all rights against the carriers, bailees are properly preserved and exercised".

The insured/appellants' application for an order that the defendants do indemnify the plaintiffs for all legal costs as regards the actions in Japan was disallowed by the High Court. The insured appealed.

Held, allowing the appeal: upon a reading of the correspondence which has passed between the appellants and the respondents the proper inference to be drawn was that the respondents had required the appellants to commence the actions against the third parties. The appellants commenced proceedings against the third parties not on their own initiative but on the insistence of the respondents and the appellants were entitled to invoke the said Clause 9 to throw liability for the costs of those actions on the respondents.

COURT OF APPEAL.

Woo Bih Li for the appellants.

K. Gopalan (*N.K. Pillai* with him) for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the Judgment of the Court): This is an appeal from the judgment of the High Court on an Originating Summons in which the appellants (Plaintiffs in the Originating Summons) asked for the following:–

"1. An order that the Defendants do indemnify the Plaintiffs for all legal costs including but not limited to solicitor and client costs, and party and party costs and disbursements as regards the following actions in Japan:–

(a) Karl Ljungberg and Co. AB v. the Sanko Steamship Co. Ltd., the Tokyo District Court File No. Showa 56 (WA) 2606;

(b) Karl Ljungberg and Co. AB against Mammoth Bulk Carriers Ltd., the Tokyo District Court File No. Showa 56 (WA) 3034.

2. A declaration that the Plaintiffs shall be at liberty to discontinue and withdraw the actions referred to in paragraph (1) above and to *withdraw and* refrain from commencing any other action for the protection of the Defendants' interests without prejudice to the rights of the Plaintiffs to claim against the Defendants for loss of and damage to Phenol Film Faced Plywood insured under the Defendants policy of marine insurance number 1.21.77. 01916.80 dated February 6, 1980.

3. Costs.

4. Such further or other relief as this court thinks fit."

The respondents resisted the appellants' application.

The High Court granted an order in terms of